Supreme Court, U.S.
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No. 96-7185

In The Supreme Court of the United States

October Term, 1996

Garrit Bates,

Petitioner,

v.

United States of America,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 18, 1996
CERTIORARI GRANTED FEBRUARY 18, 1997

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 8, 1994

The United States files grand jury indictment charging Garrit Bates with twelve (12) counts of Misapplication of Funds in violation of 20 U.S.C. § 1097(a) and 18 U.S.C. § 2.

February 7, 1995

The Defendant, Garrit Bates, files Motion to Dismiss Indictment

April 18, 1995

The United States District Court for Northern District of Indiana, Honorable Robert L. Miller, Judge, enters Judgement granting Defendant's Motion to Dismiss Counts 1 through 12 of the Indictment

May 17, 1995

The United States of America files its Notice of Appeal of Judgement dismissing the indictment against Garrit Bates

September 20, 1996

The United States Court of Appeals enters its Judgement —With Oral Argument, vacating the judgement of the District Court and remanding the cause to the District Court

October 23, 1996

United States Court of Appeals for Seventh Circuit grants the Motion of Garrit Bates to Stay Mandate Pending Petition for Writ of Certiorari to the United States Supreme Court

December 18, 1996

Garrit Bates files his Petition for Writ of Certiorari with the United States Supreme Court

February 18, 1996

The United States Supreme Court enters its Order granting the Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis filed by Garrit Bates

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

S Cr. 3:94CR0068RM

UNITED STATES OF AMERICA

v.

GARRIT BATES, a/k/a JERRY BATES

THE GRAND JURY CHARGES:

COUNT 1

At all times material to this indictment:

1. On or about December 17, 1986, James W. and Laurenda Jackson became the owners of the Acme Institute of Technology ("Acme"), a not-for-profit technical school located in South Bend, Indiana. Acme offered associate degree programs in electronics engineering and tool, die and plastics mold design. Acme was licensed by the Indiana Commission on Proprietary Education. The Jacksons appointed JERRY BATES Treasurer of the Board of Trustees of Acme.

2. At the time of the purchase of Acme, James and Laurenda Jackson operated a for-profit firm, Education America, Inc. Education America, Inc. purportedly was a consulting and management firm for vocational/technical schools. BATES was Vice President of Education America, Inc.

3. Students attending Acme were eligible for Guaranteed Student Loans under a program enacted by Congress and administered by the Department of Education. Under this program (found at 20 U.S.C. §§ 1070 *et seq.*) private lenders loaned Acme students money to be used for tuition and other expenses. The Department of Education guaranteed repayment of the loans in the event that the student borrower defaulted. The lending bank submitted the loan proceeds directly to Acme.

4. If a student with a Guaranteed Student Loan withdrew from Acme prior to completion of a term, pursuant to Federal Regulations (34 C.F.R. §§ 682.606 and 668.22), Acme was required to refund a portion of the loan proceeds to the lending institution. The refund amount was considered unearned income. Acme was required to have a fair and equitable refund policy. The amount of the refund was based upon how much of the term had been completed and how much the student had paid the school at the time of withdrawal. Acme's refund policy was incorporated into the Student Enrollment Agreement And Application For Admission signed by each student. The refund policy was also contained in the school catalog. Federal Regulation (34 C.F.R. § 682.607(c)) required that refunds be paid within 30 or 60 days from withdrawal, depending on the date of the loan application. Refunds on Guaranteed Student Loans for unearned tuition were to be paid by Acme directly to the lending institutions. The lending institutions would deduct the refund from the amount owed by the student.

5. On April 30, 1987, Jackson, the President of Acme, signed a Program Participation Agreement with the Department of Education. In that agreement, Jackson agreed to comply with all statutes and regulations governing the Guaranteed Student Loan Program. On January 1, 1990, BATES signed a Program Participation Agreement on behalf of another school operated by Education America, Inc. That school was located in Fort Wayne, Indiana.

6. Beginning in approximately late 1987, Acme began a pattern and practice of not making refunds on Guaranteed Student Loans. The failure of Acme to pay the refunds resulted from decisions made by the Jacksons and BATES.

7. On April 14, 1988, Jackson sent a letter to the Director of Acme which directed him, effective the following month, to "tally the [schools'] receipts for the preceding month and remit a management fee of 10% of [the] total receipts to Education America, Inc." A regular salary for the Jacksons was also to be remitted on a monthly basis. The letter further stated: "If the above creates a cash shortfall in your school, money will be loaned back to you to cover the shortfall." This letter was also sent to the Director of Interstate Technical Institute, located in Ft. Wayne, Indiana, which Jackson purchased on contract in 1986. BATES, as Vice President of Education America had oversight authority at the Interstate Technical Institute.

8. On August 27, 1988, a memorandum from Education America's CEO was sent to the Director of Acme. The memorandum indicated that it was being recommended to Jackson that a full audit be done on Acme due, in part, to unmade refunds. By the end of September 1988, approximately $55,000 was owed on past due guaranteed Student Loan refunds.

9. In late 1988 or early 1989, Education America officials directed Acme to discontinue the use of a special bank account which segregated the unearned income from the general account. This special account was utilized by the former owners of Acme so that funds were always available for timely refunds to the lenders.

10. In January 1989, Acme's Financial Aid Director sent Jackson a letter pointing out the seriousness of the unmade refunds. The letter listed a total refund liability of approximately $68,000.00 owed to various lending institutions.

11. At about this same time, BATES determined on a week-to-week or sometimes day-to-day basis which bills would or would not be paid. BATES had an understanding with the Jacksons that payments to the Jacksons and/or Education America and other bills took priority over payment of refunds. BATES specifically instructed Acme employees not to make student loan refunds.

12. By March 1989, the refund liability had grown to approximately $85,000.00. On March 13, 1989, BATES, as Executive Vice-President of Education America, notified the Financial Aid Director, at her request, that she was released from all responsibility concerning refunds on Guaranteed Student Loans. The letter stated that the refund of any unearned tuition was "solely the responsibility and decision of the corporate office." The Financial Aid Director was told to continue processing new applications and was further advised to continue to prepare refund documents to be approved by the corporation for payment.

13. In May 1989, the National Association of Trade and Technical Schools (NATTS), a national accrediting association, sent its written report following an on-site audit at Acme in April 1989. Accreditation by a national association is required to maintain a technical school's eligibility to participate in the Guaranteed Student Loan program. The report contained a finding that the school had "inadequately demonstrated its ability to make appropriate and timely refunds, [and had also] loaned substantial amounts of money to the chief trustee and a non-related profit making institution." The report also noted evidence of "upstreaming" of management fees to a management company owned by the principle trustee James Jackson.

14. On April 7, 1990, the U.S. Department of Education advised Jackson that effective March 8, 1990, Acme was no longer eligible to participate in the Guaranteed Student Loan Program due to its loss of accreditation.

15. On June 5, 1990, Acme ceased operations and closed its doors.

16. The amount of refunds for unearned income from the Guaranteed Student Loan Program at Acme for the period that BATES was its chief financial officer was approximately $139,649.00, plus interest and special allowances.

17. On or about January 15, 1990, in the Northern District of Indiana,

GARRIT BATES, a/k/a
JERRY BATES,

defendant herein, did knowingly and willfully misapply funds, to-wit: $2,804.23, provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code;

In violation of Title 20, United States Code, Section 1097(a) and Title 18, United States Code, Section 2.

COUNT 2

THE GRAND JURY FURTHER CHARGES:

1. The introductory paragraphs and the allegations in Count 1 of this indictment are herein incorporated by reference.

2. On or about January 16, 1990, in the Northern District of Indiana,

GARRIT BATES, a/k/a
JERRY BATES,

defendant herein, did knowingly and willfully misapply funds, to-wit: $1,566.32, provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code;

In violation of Title 20, United States Code, Section 1097(a) and Title 18, United States Code, Section 2.

COUNT 3

THE GRAND JURY FURTHER CHARGES:

1. The introductory paragraphs and the allegations in Count 1 of this indictment are herein incorporated by reference.

2. On or about January 29, 1990, in the Northern District of Indiana,

GARRIT BATES, a/k/a
JERRY BATES,

defendant herein, did knowingly and willfully misapply funds, to-wit: $714.48, provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code;

In violation of Title 20, United States Code, Section 1097(a) and Title 18, United States Code, Section 2.

COUNT 4

THE GRAND JURY FURTHER CHARGES:

1. The introductory paragraphs and the allegations in Count 1 of this indictment are herein incorporated by reference.

2. On or about April 2, 1990, in the Northern District of Indiana,

GARRIT BATES, a/k/a
JERRY BATES,

defendant herein, did knowingly and willfully misapply funds, to-wit: $903.73, provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code;

In violation of Title 20, United States Code, Section 1097(a) and Title 18, United States Code, Section 2.

COUNT 5

THE GRAND JURY FURTHER CHARGES:

1. The introductory paragraphs and the allegations in Count 1 of this indictment are herein incorporated by reference.

2. On or about April 27, 1990, in the Northern District of Indiana,

GARRIT BATES, a/k/a
JERRY BATES,

defendant herein, did knowingly and willfully misapply funds, to-wit: $1,940.00, provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code;

In violation of Title 20, United States Code, Section 1097(a) and Title 18, United States Code, Section 2.

COUNT 6

THE GRAND JURY FURTHER CHARGES:

1. The introductory paragraphs and the allegations in Count 1 of this indictment are herein incorporated by reference.

2. On or about April 27, 1990, in the Northern District of Indiana,

GARRIT BATES, a/k/a
JERRY BATES,

defendant herein, did knowingly and willfully misappy funds, to-wit: $2,156.14, provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code;

In violation of Title 20, United States Code, Section 1097(a) and Title 18, United States Code, Section 2.

COUNT 7

THE GRAND JURY FURTHER CHARGES:

1. The introductory paragraphs and the allegations in Count 1 of this indictment are herein incorporated by reference.

2. On or about May 7, 1990, in the Northern District of Indiana,

GARRIT BATES, a/k/a
JERRY BATES,

defendant herein, did knowingly and willfully misapply funds, to-wit: $1,660.80, provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code;

In violation of Title 20, United States Code, Section 1097(a) and Title 18, United States Code, Section 2.

COUNT 8

THE GRAND JURY FURTHER CHARGES:

1. The introductory paragraphs and the allegations in Count 1 of this indictment are herein incorporated by reference.

2. On or about May 11, 1990, in the Northern District of Indiana,

GARRIT BATES, a/k/a
JERRY BATES,

defendant herein, did knowingly and willfully misapply funds, to-wit: $675.13, provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code;

In violation of Title 20, United States Code, Section 1097(a) and Title 18, United States Code, Section 2.

COUNT 9

THE GRAND JURY FURTHER CHARGES:

1. The introductory paragraphs and the allegations in Count 1 of this indictment are herein incorporated by reference.

2. On or about May 18, 1990, in the Northern District of Indiana,

GARRIT BATES, a/k/a
JERRY BATES,

defendant herein, did knowingly and willfully misapply funds, to-wit: $1,940.00, provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code;

In violation of Title 20, United States Code, Section 1097(a) and Title 18, United States Code, Section 2.

COUNT 10

THE GRAND JURY FURTHER CHARGES:

1. The introductory paragraphs and the allegations in Count 1 of this indictment are herein incorporated by reference.

2. On or about June 9, 1990, in the Northern District of Indiana,

GARRIT BATES, a/k/a
JERRY BATES,

defendant herein, did knowingly and willfully misapply funds, to-wit: $1,486.47, provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code;

In violation of Title 20, United States Code, Section 1097(a) and Title 18, United States Code, Section 2.

COUNT 11

THE GRAND JURY FURTHER CHARGES:

1. The introductory paragraphs and the allegations in Count 1 of this indictment are herein incorporated by reference.

2. On or about June 12, 1990, in the Northern District of Indiana,

GARRIT BATES, a/k/a
JERRY BATES,

defendant herein, did knowingly and willfully misapply funds, to-wit: $779.69, provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code;

In violation of Title 20, United States Code, Section 1097(a) and Title 18, United States Code, Section 2.

COUNT 12

THE GRAND JURY FURTHER CHARGES:

1. The introductory paragraphs and the allegations in Count 1 of this indictment are herein incorporated by reference.

2. On or about June 15, 1990, in the Northern District of Indiana,

GARRIT BATES, a/k/a
JERRY BATES,

defendant herein, did knowingly and willfully misapply funds, to-wit: $474.28, provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code;

In violation of Title 20, United States Code, Section 1097(a) and Title 18, United States Code, Section 2.

A TRUE BILL

/s/ Karen Burns
Foreperson

JON E. DEGUILIO
United States Attorney

By: /s/ Ruth M. Hennage
RUTH M. HENNAGE
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

(Caption Omitted)

MOTION TO DISMISS

The defendant, Garrit Bates, through undersigned counsel, pursuant to rule of Criminal Procedure 12(b)(2), moves the court for an order dismissing the indictment filed herein on September 8th, 1994, on the ground that the indictment fails to set forth essential facts which constitute a criminal offense under 20 U.S.C. 1097(a).

Respectfully Submitted,

/s/ C. Richard Oren
C. RICHARD OREN #15074-25
Attorney for Defendant
1104 Main Street
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Attorney for Defendant

(Certificate of Service Omitted)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

(Caption Omitted)

JUDGMENT

This action came before the court, United States District Judge Robert L. Miller, Jr. presiding. The decision having been duly rendered, it is ordered and adjudged.

That defendant's motion to dismiss counts 1 through 12 of the indictment is GRANTED.

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on: April 18, 1995

By: /s/ Geraldine J. Crockett
GERALDINE J. CROCKETT
Deputy Clerk of the Court

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

(Caption Omitted)

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the Judgment on Decision by the Court dismissing the indictment against Garrit Bates, entered in this action on the 18th day of April, 1995.

JON E. DEGUILIO
United States Attorney

By: /s/ Ruth M. Hennage
RUTH M. HENNAGE
Assistant United States Attorney
M01 Federal Building
204 S. Main Street
South Bend, IN 46601-2191
219/236-8287

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

(Caption Omitted)

MEMORANDUM AND ORDER

Defendant Garrit Bates' moves to dismiss the indictment against him and for oral argument. Because the parties have adequately briefed the motion to dismiss, the court denies the motion for oral argument. For the following reasons, the court grants the motion to dismiss.

Mr. Bates was indicted on September 8, 1994 on twelve counts of aiding and abetting the knowing and willful misapplication of federally insured funds pursuant to 20 U.S.C. § 1097(a), 18 U.S.C. § 2. Mr. Bates contends that the facts alleged in the indictment could not support a finding that the essential elements of § 1097(a) have been met. The government disagrees both with Mr. Bates's version of the essential elements and with his conclusion that the indictment fails to allege facts that could satisfy those essential elements.

The indictment charges that Mr. Bates was the Treasurer of the Board of Trustees of the Acme Institute of Technology, a not-for-profit technical school owned by James and Laurenda Jackson. Mr. Bates also was Vice-President of Education America, Inc., which the Jacksons also owned.

Acme students were eligible for guaranteed student loans ("GSLs") under a program enacted by Congress and administered by the Department of Education. If a student withdrew from Acme before a term's completion, federal regulations required Acme to refund a portion of

loan proceeds to the lending institution. Federal regulations required that the refunds be paid within 30 or 60 days of the student's withdrawal.

The indictment charges that beginning in 1987, decisions made by the Jacksons and Mr. Bates resulted in Acme beginning a practice of not making refunds on GSLs. In late 1988 or 1989, Education America officials directed Acme to discontinue the use of a special bank account that segregated the refunds from the general account. Around January 1989, according to the indictment, Mr. Bates determined on a week-to-week, or sometimes day-to-day, basis which bills would or would not be paid with the understanding that payments to the Jacksons took precedence over payment of refunds. The indictment alleges that Mr. Bates specifically instructed Acme employees not to make student loan refunds.

On March 13, 1989, Mr. Bates, as Executive Vice-President of Education America, allegedly notified the Financial Aid Director that, pursuant to her request, she was released from all responsibility concerning refunds on GSLs. The letter stated that the refund of any unearned tuition was "solely the responsibility and decision of the corporate office." The Financial Aid Director allegedly was directed, however, to continue to prepare refund documents to be approved by the corporation for payment.

Effective March 8, 1990, Acme no longer was eligible to participate in the GSL program because Acme had lost its accreditation from the National Association of Trade and Technical Schools. On June 5, 1990, Acme ceased operation and closed its doors; at that time, the amount of unrefunded GSL funds allegedly had accrued to a total of $139,649.00 while Mr. Bates was chief financial officer at Acme.

The indictment then charges, in twelve different counts, that on January 15, January 16, January 29, April 2,

twice on April 27, May 7, May 11, May 18, June 9, June 12 and June 15 of 1990, Mr. Bates knowingly and willfully misapplied funds provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code in violation of 20 U.S.C. § 1097(a) and 18 U.S.C. § 2.

The indictment charges Mr. Bates with crimes occurring in 1990. At that time, 20 U.S.C. § 1097(a) defined criminal conduct as follows: "Any person who knowingly and willfully embezzles, misapplies, steals, obtains by fraud, false statement or forgery any funds . . . provided or insured under this subchapter . . . ."

Mr. Bates relies upon *United States v. Kammer*, 1 F.3d 1161, 1165 (11th Cir. 1993), to argue that, with respect to a charge under § 1097(a), "[t]o establish a criminal misapplication, the government must prove (1) a conversion of the property to the use of the defendant or a third party, and (2) fraudulent intent." *United States v. Kammer*, 1 F.3d at 1165. Mr. Bates contends that the indictment does not allege facts supporting these essential elements.

The government responds that the *Kammer* court's interpretation of the essential elements of § 1097(a) is erroneous. The government contends that the elements necessary to prove the charge of misapplication of funds under § 1097(a) are: (1) that the funds described in the indictment were provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code at the time alleged; (2) that the defendant misapplied such funds; and (3) that he did so knowingly and willfully. The government defines "misapplication" to mean a conversion of funds to the defendant's own use or the use of another.

The government's version of the essential elements restates the elements as they are stated in § 1097(a), but the controversy between Mr. Bates and the government lies in the definition of misapplication of funds. Both parties argue, and the court agrees, that a misapplication

requires a conversion, but the parties dispute whether a misapplication under § 1097(a) also requires fraudulent intent.

The government contends that the Seventh Circuit does not always require an intent to defraud with respect to statutes that forbid "misapplication of funds," citing *United States v. Brown*, 742 F.2d 363 (7th Cir. 1984). Applying 18 U.S.C. § 665 of the Comprehensive Employment and Training Act ("CETA"), the *Brown* court stated that:

> In *United States v. Tamargo*, 637 F.2d 346[, 350] (5th Cir.), *cert. denied*, 454 U.S. 824 (1981), the court approved the trial court's use of a jury instruction that stated that "misapplication of funds" for purposes of § 665 meant the conversion of funds to the defendant's own use or the use of another.

742 F.2d at 366. The *Brown* court said no more regarding the term's definition. The *Brown* court, however, omitted a critical clause from *Tamargo*'s definition of misapplication of funds, for *Tamargo* actually states that, "The trial court here properly charged the jury to "misapply money or property means a willful conversion or taking of such money or property to one's own use and benefit or the use and benefit for another, *with intent to defraud*." *United States v. Tamargo*, 637 F.2d at 350 (emphasis added). Accordingly, the quoted language from the *Brown* case has little influence.

Nevertheless, the court is hesitant to follow the *Kammer* case. The essential elements stated in the *Kammer* case were derived from *United States v. Jakeway*, 783 F. Supp. 590, 597 (M.D. Fla. 1992), in which the court explained that although the Eleventh Circuit had not defined "misapplication" in the context of § 1097(a), the term had been defined in the context of 18 U.S.C. § 656, which deals with misapplication of funds by a bank officer or employee. *United States v. Jakeway*, 783 F. Supp. at 597, n. 6. Thus, the *Jakeway* court extrapolated the ele-

ments of criminal misapplication from *United States v. Acosta*, 748 F.2d 577, 580 (11th Cir. 1984), which held that misapplication under 18 U.S.C. § 656 is the "willful taking of an insured bank's money by its employee with intent to defraud the bank." *United States v. Acosta*, 748 F.2d at 580. Therefore, the *Kammer* holding is founded upon an earlier holding that, under a different statute, misapplication required fraudulent intent.

The Seventh Circuit has not defined "misapplication" with respect to § 1097(a), but, like the Eleventh Circuit, requires a finding of intent to defraud or injure with respect to misapplication of bank funds under 18 U.S.C. § 656. *United States v. Crabtree*, 979 F.2d 1261, 1266 (7th Cir. 1992), *cert. denied*, 114 S. Ct. 217 (1993) (to prove a violation of 18 U.S.C. § 656, the government must prove, among other things, that the defendant willfully misapplied funds of the bank with the intent to injure or defraud the bank).

This does not necessarily compel a conclusion that § 1097(a) also requires fraudulent intent. The fraudulent intent element required under 18 U.S.C. § 656 has a historical basis in the statute itself:

> The current statutory language does not expressly require any proof of intent. Originally the statute did require proof of intent to "injure or defraud" the bank or "deceive" a bank officer but these words were inadvertently dropped in the course of a technical revision of the criminal code. To avoid making every unauthorized loan by a bank officer a willful misapplication of bank funds, courts, including our own, read the missing words back into the statute.

United States v. Bates, 852 F.2d 212, 215 (7th Cir. 1988); *see also United States v. Angelos*, 763 F.2d 859, 861 (7th Cir. 1985); *United States v. Shively*, 715 F.2d 260, 266 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) ("these words were dropped by a reviser without intent to alter the meaning of the law").

In *United States v. Garcia*, 751 F.2d 1033 (9th Cir. 1985), however, the Ninth Circuit affirmed the dismissal of an indictment for "wilfully misappl[ying]" CETA funds in violation of 18 U.S.C. § 665 because the government conceded it could not prove intent to injure or defraud. *United States v. Garcia*, 751 F.2d at 1034. In concluding that § 665 requires a specific intent to injure or defraud, the district court had relied on the Ninth Circuit's interpretation of the bank fraud statute, 18 U.S.C. § 656. *Id.* at 1036. On appeal, the government contended that the analogy between § 656 and § 665 was not compelling because, as discussed above, the original version of § 656 expressly required an intent to injure and defraud the bank, and Congress had expressly disclaimed any intention of changing the law. *Id.* The Ninth Circuit rejected this contention, stating:

> But this circumstance cuts against the government's reading of the statute. The only reason Congress could have considered the explicit requirement of a purpose to injure or defraud redundant was that Congress understood the term "willful misapplication" to include such an intent by implication.

Id.

Thus, the Ninth Circuit held that a "willful misapplication" for the purposes of § 665 necessarily includes an intent to defraud or injure. In doing so, the court reasoned that:

> In a criminal statute, "willfully" generally means a voluntary, intentional violation of a known legal duty in bad faith or with evil purpose. *See United States v. Pomponio*, 429 U.S. 10, 11-12 (1976) (per curiam); *United States v. Bishop*, 412 U.S. 346, 260 (1973). A general intent to commit the proscribed act is not enough; a specific intent to do something the law forbids is required. *See United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980). The definition of "misapplication" suggests

> a similar element: "[i]mproper, illegal, wrongful, or corrupt use [or] application of funds, property, etc." Black's Law Dictionary 901 (5th Ed. 1979).

Id. at 1035; *see also Morissette v. United States*, 342 U.S. 246, 276 (1952) (holding that "knowingly converts" under 18 U.S.C. § 641 required an intention "wrongfully to deprive another of possession of property.").

The Ninth Circuit gave much importance to the fact that the term "willfully misapply" in 18 U.S.C. § 665(a) "is embedded in a series of words referring to harmful or wrongful acts clearly causing financial injury to the United States or impeding the achievement of CETA's goals. All the acts prohibited by the statute are more serious in character than simple violations of procedural requirements." *United States v. Garcia*, 751 F.2d at 1035-36; *see also United States v. Hammen*, 977 F.2d 379, 384 (7th Cir. 1992) (in a 18 U.S.C. § 656 case, "[t]he intent to defraud or injure the bank is what separates criminal misapplication from mere maladministration."); *United States v. Bates*, 852 F.2d at 215 (stating that courts read the intent to defraud or injure back into 18 U.S.C. § 656 "[t]o avoid making every unauthorized loan by a bank officer a willful misapplication of bank funds.").

Similarly, the term "misapply" in § 1097(a) "is embedded in a series of words referring to harmful or wrongful acts clearly causing financial injury to the United States . . ." *United States v. Garcia*, 751 F.2d at 1035. Further, as was the case in *Garcia* under 18 U.S.C. § 665, "[a]ll the acts prohibited by [§ 1097(a)] are more serious in character than simple violations of procedural requirements." *United States v. Garcia*, 751 F.2d at 1036.

The court finds the reasoning of *Garcia* persuasive, and thus elects to follow the course of *United States v. Kammer*, 1 F.3d 1161 in holding that, with respect to

a charge under § 1097(a), "[t]o establish a criminal misapplication, the government must prove (1) a conversion of the property to the use of the defendant or a third party, and (2) fraudulent intent." *United States v. Kammer*, 1 F.3d at 1165. Thus, the essential elements of a willful and knowing misapplication under § 1097(a) include: (1) that the funds described in the indictment were provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code at the time alleged; (2) that the defendant willfully and knowingly misapplied such funds; and (3) that he did so with an intent to injure or defraud the United States. A defendant misapplies funds by converting them to the defendant's own use or the use of another.

Mr. Bates contends that the indictment is defective because it does not allege facts supporting a finding that the defendant's actions constitute violations of § 1097(a). He contends that the indictment fails to recite all of the essential elements of a willful and knowing misapplication under § 1097(a). An indictment is sufficient if it "(1) states all the elements of the offense charged; (2) informs the defendant of the nature of the charge, enabling the defendant to prepare a defense; and (3) enables the defendant to plead the judgment as a bar to later prosecution for the same offense." *United States v. F. J. Vollmer & Co.*, 1 F.3d 1511, 1518 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 688 (1994) (citing *United States v. James*, 923 F.2d 1261, 1265 (7th Cir. 1991). "Generally, an indictment is sufficient when it sets forth the offense in the words of the statute itself, as long as those words expressly set forth all the elements necessary to constitute the offense intended to be punished." *United States v. Hinkle*, 637 F.2d 1154, 1157 (7th Cir. 1981); *see also United States v. Beard*, 713 F. Supp. 285, 289 (S.D. Ind. 1989).

Under this standard, the indictment is insufficient on its face. Each count of the indictment fails to state an

essential element of § 1097(a): that the defendant misapplied protected funds "with an intent to injure or defraud the United States." As such, the indictment must be dismissed.

For the reasons stated above, the court GRANTS Mr. Bates' motion to dismiss indictment (filed February 7, 1995 (#19)), and VACATES the status conference scheduled for April 21, 1995.

SO ORDERED.

ENTERED: April 17, 1995

/s/ Robert L. Miller, Jr.
ROBERT L. MILLER, JR.
Judge
United States District Court

cc: R. Hennage; C.R. Oren

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-2203

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
GARRIT BATES,
Defendant-Appellee.

Argued February 12, 1996—Decided September 20, 1996

Before CUDAHY, FLAUM, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* After Garrit Bates was charged with twelve counts of willfully misapplying federally guaranteed Title IV student aid funds, he filed a pretrial motion to dismiss the indictment as insufficient. Specifically, he argued that both conversion and intent to injure or defraud the federal government are elements of the offense of willfully misapplying financial aid monies and that the indictment had failed to adequately allege either one. The district court granted his motion to dismiss after determining that the indictment failed to allege intent to injure or defraud the United States, and the government appeals to this court. Because we find that a conviction for willful misapplication of Title IV funds does not require proof of the defendant's intent to injure or defraud the United States, and that the indictment is otherwise sufficient, we vacate the judgment of the district court and reinstate the prosecution.

I. History

Given that the district court determined that the indictment was insufficient on its face, for this appeal we take the facts as they are alleged in the indictment, which are set out below. James and Laurenda Jackson are the owners and operators of Education America, Inc., a for-profit consulting and management firm for various technical and vocational schools. In December 1986, the Jacksons acquired ownership of the Acme Institute of Technology, a not-for-profit technical school located in South Bend, Indiana. After the acquisition, the Jacksons appointed Bates, who was vice president of Education America at the time, to act as Acme's chief financial officer and treasurer of the Acme board of trustees.

On April 30, 1987, Mr. Jackson, acting as president of Acme, signed a program participation agreement with the Department of Education. Under the agreement, Acme became authorized to receive student loan checks through the Title IV federal Guaranteed Student Loan ("GSL") program, but participation in the program was contingent upon (1) Acme's continued accreditation by an approved accrediting association, and (2) Jackson's promise to comply with all statutes and regulations governing the GSL program. Around the same time, Bates signed a similar participation agreement for a different school owned by Education America, and he therefore presumably understood the responsibilities imposed by the Acme participation agreement.

Through the GSL program, banks and other private financial institutions would lend money to Acme students for tuition and other educational expenses. The federal government's role was to administer the loan program and guarantee payment of the loans in the event any of the student borrowers defaulted. Loan checks were mailed directly to Acme and, once endorsed, were credited against the student's tuition debt. However, if a student with a GSL withdrew from Acme prior to completion of a term,

federal regulations required Acme to refund a portion of the loan proceeds to the lender within 30 or 60 days from withdrawal (depending on the date of the loan application), which was then to be deducted from the amount owed. Of course, if loan refunds were not made, the student—and, in the event of default, the government—would nonetheless remain liable to the lender for the full amount of the loan.

On April 14, 1988, Mr. Jackson sent a letter to the director of Acme instructing him (1) to remit 10 percent of Acme's gross receipts from the previous month to Education America as a management fee, and (2) to arrange for a specified monthly salary to be paid by Acme to the Jacksons. The letter explained that if these required payments caused Acme to experience a cash shortfall, Education America would loan money back to Acme in order to cover the discrepancy. As chief financial officer of Acme, Bates had the authority to determine which of Acme's bills would be paid as they came due, and he repeatedly gave these fee and salary payments to Education America and the Jacksons priority over refunds to lenders of student loan monies for withdrawn students. In doing this, Bates would specifically direct Acme employees not to make required student loan refunds. By the end of September 1988, Acme had amassed a GSL refund debt of approximately $55,000.

In late 1988 or very early 1989, Education America officials directed Acme to discontinue using a special bank account that was designed to segregate unearned student loan monies (those that should have been earmarked for refunds) from the school's general funds account. When Acme's refund arrearage had grown to around $68,000 by January 1989, Acme's financial aid director sent a letter to Mr. Jackson frustratedly pointing out the seriousness of failing to pay refunds of Title IV monies. In March 1989, Acme's unpaid student loan refunds totaled $85,000. That month, Bates notified Acme's financial aid director,

at her request, that she was absolved of all legal responsibility concerning refunds on GSLs and that such funds would be "solely the responsibility and decision of the corporate office."

In April 1989, the National Association of Trade and Technical Schools ("NATTS"), a national accrediting association, performed an on-site audit of Acme for the purpose of determining whether it should continue to accredit the school. In its May 1990 report to the Department of Education, NATTS found that Acme had "inadequately demonstrated its ability to make appropriate and timely refunds," and that it had "loaned substantial amounts of money" and engaged in the "upstreaming" of management fees to Education America and its owner, Mr. Jackson, who also happened to be Acme's president and chairman of the board of trustees.

After losing its accreditation, Acme received notice from the Department of Education that effective March 8, 1990, Acme was no longer eligible to participate in the GSL program. On June 5, 1990, Acme closed its doors, having accrued a total student loan refund debt of $139,649, not including interest and certain special allowances.

On September 8, 1994, a federal grand jury handed down a twelve-count indictment against Bates. Following a recitation of the facts set out above, the indictment charges that on twelve separate occasions between January 15 and June 15, 1990, Bates knowingly and willfully misapplied specified amounts of federally guaranteed student loan funds, in violation of 20 U.S.C. § 1097 and 18 U.S.C. § 2. At the time of Bates's alleged wrongdoing in 1990, § 1097(a) declared guilty of a crime "[a]ny person who knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery any funds, assets, or property provided or insured under [Title IV of the Higher Education Act of 1965] . . . ." 20 U.S.C. § 1097(a).

On February 7, 1995, Bates filed a motion to dismiss the indictment. The memorandum in support of his motion argued first that conviction under § 1097(a) for willful misapplication of student aid funds requires proof of both conversion and the defendant's intent to injure or defraud the United States, and second, that the indictment failed to allege sufficient facts to constitute conversion and neglected to allege intent to injure or defraud the United States at all. The district court agreed that § 1097(a) requires proof of the intent to injure or defraud the government and that the indictment had failed to allege such intent, and it therefore granted the motion and dismissed the indictment.

II. Analysis

The government appeals from the judgment of dismissal, arguing (1) that a conviction for willful misapplication of Title IV funds does not require that the government demonstrate the defendant's intent to injure or defraud the United States, and (2) that regardless of whether § 1097(a) requires a showing of such intent, the indictment was facially sufficient. We address these separate arguments in turn. Our review of a district court's determination concerning the facial sufficiency of an indictment is *de novo*. *Frank v. United States*, 914 F.2d 828, 830 (7th Cir. 1990) (citing *United States v. Bucey*, 876 F.2d 1297, 1301-02 (7th Cir.), *cert. denied*, 493 U.S. 1004 (1989)). We likewise engage in plenary review of a district court's statutory interpretation. *United States v. Shriver*, 980 F.2d 456, 459 (7th Cir. 1992).

A. Intent to Injure or Defraud the United States

A basic tenet of criminal law provides that *actus non facit reum nisi mens sit rea*, meaning an act does not make one guilty unless his mind is guilty. Thus, at common law, nearly all crimes required proof that the defendant not only committed a wrongful act, but that he did

so with the requisite *mens rea*, or culpable mental state. As history has witnessed the statutory codification of criminal offenses, enacting legislatures have employed such words as "intentionally," "willfully," or "purposefully" to signifiy the common law requirement of mental culpability. *See Morissette v. United States*, 342 U.S. 246, 251-52, 72 S. Ct. 240, 244 (1952).

But criminal intent (even when differentiated from such other, lesser mental states as objective knowledge, recklessness, or negligence) is an elusive concept—some crimes may demand proof of only the defendant's *general* intent to engage consciously and voluntarily in the proscribed conduct, while other crimes may additionally require proof of the defendant's *specific* intent to effectuate a particular result. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.5, at 302-18 (1986 & Supp. 1996). On this appeal, we must reach the question we declined to answer in *United States v. Ross*, 77 F.3d 1525, 1546 (7th Cir. 1996): whether conviction under 20 U.S.C. § 1097(a) for willfully misapplying federally insured student aid funds requires the government to allege and prove the defendant's specific intent to injure or defraud the United States.

In *Morissette*, the Supreme Court instructed:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

342 U.S. at 263, 72 S. Ct. at 250. Congress has utilized the expression "willful misapplication" in a host of criminal statutory provisions. And thus, although few of these crimes are (as in *Morissette*) centuries old, we have much

to which we may turn by way of analogy in discerning the elements of willful misapplication, as the term is used in § 1097(a).

Bates contends, citing *United States v. Kammer*, 1 F.3d 1161, 1165 (11th Cir. 1993),* and *United States v. Jakeway*, 783 F. Supp. 590, 597 (M.D. Fla. 1992), that we should look for guidance to our interpretation of 18 U.S.C. § 656, which prohibits bank insiders from, among other things, willfully misapplying the bank's funds. This court, like the Eleventh and most of our other sister circuits, has defined the crime of willfully misapplying bank funds to require proof (1) that the defendant intentionally converted bank funds to his own use or the use of another, and (2) that the defendant did so with the specific intent to injure or defraud the bank. *United States v. Crabtree*, 979 F.2d 1261, 1266-67 (7th Cir. 1992), *cert. denied*, 510 U.S. 878 (1993); *United States v. Bruun*, 809 F.2d 397, 408 (7th Cir. 1987). Either the intent to injure *or* the intent to defraud will suffice, and they are not the same. *United States v. Bates*, 852 F.2d 212, 215 (7th Cir. 1988); *United States v. Angelos*, 763 F.2d 859, 861 (7th Cir. 1985). For the defendant to have acted with the intent to injure the bank, "it is sufficient that the loan officer engaged in acts, the natural tendency of which would be to injure the bank." *Crabtree*, 979 F.2d at 1268 (quoting *Bruun*, 809 F.2d at 408). Intent to defraud the bank, on the other hand, "means to take financial advantage of a confidential relationship and does not require any intent to injure the bank." *Bates*, 852 F.2d at 215-16 (citing *Angelos*, 763 F.2d at 861-62).

The government concedes that willful misapplication of federally guaranteed student aid funds requires the defend-

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* Because this opinion conflicts with the Eleventh Circuit's holding in *Kammer*, it was circulated before release to all judges in active service pursuant to 7th Cir. R. 40(e). No judge requested a rehearing en banc.

ant to have intentionally converted such funds to his own use or the use of a third party, but it argues that the defendant's specific intent to injure or defraud the United States is not an element of the offense. We agree.

The mere fact that we have interpreted willful misapplication of bank funds to require both intentional conversion *and* the intent to injure or defraud the bank does not necessitate the conclusion that specific fraudulent or injurious intent is part and parcel of "willful misapplication." In fact, quite the opposite is true. Intent to injure or defraud the bank is not subsumed within the phrase "willful misapplication," but rather is a separate and distinct component of § 656. *See Crabtree*, 979 F.2d at 1266 (noting that § 656 requires both "that the defendant willfully misapplied funds of the bank" and that he did so "with the intent to injure or defraud the bank"). The point is further illustrated by the Fifth Circuit's recent approval of the following instructions in a bank fund misapplication case:

> To willfully misapply a bank's money or property means an intentional conversion of such money or property to one's own use and benefit, or for the use and benefit of another, knowing that one had no right to do so.
>
> To act with the intent to defraud means to act with an intent to deceive or cheat someone, ordinarily for the purpose of causing some financ[ial] loss to another or bringing about some financial gain to oneself.

United States v. Giraldi, No. 94-60602, 1996 WL 339177, at *8 (5th Cir. June 19, 1996). Thus, intent to injure or defraud is an offense element that must be proved *in addition to* willful misapplication in a § 656 prosecution.

It is true that the language of § 656, like that of § 1097(a), does not explicitly require the defendant to have acted with specific fraudulent or injurious intent.

However, there is a historical rationale for reading into § 656 the requirement of the defendant's intent to injure or defraud the bank. In *Bates*, we explained:

> The current statutory language does not expressly require any proof of [fraudulent or injurious] intent. Originally the statute did require proof of intent to "injure or defraud" the bank or "deceive" a bank officer but these words were inadvertently dropped in the course of a technical revision of the criminal code. To avoid making every unauthorized loan by a bank officer a willful misapplication of bank funds, courts, including our own, read the missing words back into the section.

852 F.2d at 215 (citing *Angelos*, 763 F.2d at 861; *United States v. Shively*, 715 F.2d 260, 266 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984)). Section 1097(a) has never included a requirement that the defendant have acted with an intent to injure or defraud the government, and with no textual or historical basis for doing so, we are reluctant to read such a requirement into the statute.

Our reluctance is bolstered by this circuit's prior analysis of 18 U.S.C. § 665, another statute prohibiting the willful misapplication of federal funds—specifically, Comprehensive Employment and Training Act ("CETA") funds. In *United States v. Hamilton*, a defendant charged under § 665 with willful misapplication of CETA funds argued that he could not be convicted because he did not know the monies he misapplied were federal funds. 726 F.2d 317, 320 (7th Cir. 1984). Under § 656, a defendant cannot be convicted if he did not know the funds were the bank's because he must have acted with intent to injure or defraud the bank, and thus Hamilton urged this court to pattern our interpretation of § 665's requirements after those of § 656. *Id.* We refused to employ such an analogy, explaining that "we need not wander that far

afield, since a closer analogy is found in the general selection concerning embezzlement of public money, 18 U.S.C. § 641." *Id.* (citing *United States v. Coleman*, 590 F.2d 228 (7th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979)).

Section 641, as construed in *Morissette*, requires only that the defendant intentionally converted public funds to his own use and benefit or to that of a third person. 342 U.S. at 263, 270-72, 72 S. Ct. at 250, 254. Thus, in *United States v. Brown*, we held that " 'misapplication of funds' for purposes of § 665 mean[s] the conversion of funds to the defendant's own use or the use of another," and that "the conversion of CETA funds for the use of uncertified workers when the defendant knows of their uncertified status is a willful misapplication of funds for purposes of § 665." 742 F.2d 363, 366-67 (7th Cir. 1984). *But see United States v. Garcia*, 751 F.2d 1033, 1037 (9th Cir. 1985) (holding that intent to injure or defraud the United States is an essential element of willful misapplication under § 656-esque requirement that the defendant have acted with intent to injure or defraud the United States, holding:

> We believe that Congress, through § 665, desired to afford federal protection to the large sums of federal money entrusted to nonfederal agencies to accomplish the purposes of CETA, and did not intend to limit this protection to situations where the defendant was aware of a federal interest in the funds.

726 F.2d at 320. This reasoning applies equally here, where Congress has sought through § 1097(a) to provide broad protection for Title IV student financial aid funds entrusted to private educational institutions.

We conclude, therefore, that intent to injure or defraud the United States is not an element of willful misapplication under § 1097(a). Rather, the government must prove that the defendant misapplied—i.e., converted—Title IV

funds and that he did so knowingly and willfully. The Supreme Court has defined willfulness as the "voluntary, intentional violation of a known legal duty." *United States v. Pomponio*, 429 U.S. 10, 12-13, 97 S. Ct. 22, 24 (1976). Conversion is an "unprivileged interference with the owner's possession and enjoyment of a chattel." *Kerrigan v. American Orthodontics Corp.*, 960 F.2d 43, 45 (7th Cir. 1992); *see also Ross*, 77 F.3d at 1546 (quoting *Kammer*'s definition of conversion as "an act of dominion or control over the property that seriously interferes with the owner's rights," 1 F.3d at 1165). *Morissette* explained:

> Conversion . . . may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact.

342 U.S. at 271-72, 72 S. Ct. at 254. Thus, as a working definition, willful misapplication under § 1097(a) requires the government to allege and prove that the defendant consciously, voluntarily, and intentionally exercised unauthorized control or dominion over federally provided or guaranteed Title IV funds that interfered with the rights of the funds' true owner(s), for the use and benefit of the defendant or a third person, while knowing that such an exercise of control or dominion over the funds was a violation of the law.

B. Sufficiency of the Indictment's Allegation of Conversion

In his motion to dismiss, reiterated on appeal, Bates argued that the indictment was insufficient first because it did not allege intent to injure or defraud the government, and second because it failed to allege sufficient facts to constitute conversion. Having decided that intent to injure or defraud is not an element of § 1097(a), this leaves only Bates's argument that the indictment failed to adequately charge conversion.

Facial sufficiency is not a high hurdle. Indictments need not exhaustively describe the facts surrounding a crime's commission nor provide lengthy explanations of the elements of the offense. FED. R. CRIM. P. 7(c)(1) instructs that "[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." We have held that "[a]n indictment is sufficient if it: (1) states all the elements of the offense charged; (2) informs the defendant of the nature of the charge, enabling the defendant to prepare a defense; and (3) enables the defendant to plead the judgment as a bar to later prosecution for the same offense." *U.S. v. F.J. Vollmer & Co., Inc.*, 1 F.3d 1511, 1518 (7th Cir. 1993) (citing *United States v. James*, 923 F.2d 1261, 1265 (7th Cir. 1991)), *cert. denied*, 114 S. Ct. 688 (1994). "Generally, an indictment is sufficient when it sets forth the offense in the words of the statute itself, as long as those words expressly set forth all the elements necessary to constitute the offense intended to be punished." *United States v. Hinkle*, 637 F.2d 1154, 1157 (7th Cir. 1981).

Bates argues that the indictment fails to adequately set forth the elements of conversion because it does not charge that his handling of federaly guaranteed funds was in any way "unauthorized." Yet, the indictment alleges (1) that the school had a duty to refund unearned student loans to the lender within thirty to sixty days; (2) that

due to the participation agreement and the warnings of Acme's financial aid director, Bates knew of this duty; (3) that Bates specifically directed Acme personnel not to make refunds that were required by law; and (4) that Bates instead made management and salary payments to the Jacksons and to Education America, of which Bates happened to be vice president. These factual allegations clearly make out a charge that Bates's handling of Acme's federally guaranteed student loan funds was unauthorized.

Bates also contends, citing *Hinkle*, 637 F.2d at 1158, that the indictment is insufficient because the term "misapplication" is intrinsically vague. In *Hinkle*, we determined that an indictment charging use of a communication device to facilitate the commission of a felony involving a controlled substance, in violation of 21 U.S.C. § 843(b), was insufficient to inform the defendant of the nature of her alleged crimes. *Id.* Bates argues that "misapplication" is as uninformative as "facilitation." But Bates misunderstands the holding in *Hinkle*. The fatal ambiguity in *Hinkle* was that the indictment, although following the language of the statute in alleging the offense of facilitating a felony involving a controlled substance, failed to identify either the felony facilitated or the controlled substance involved. *Id.* The "facilitation" charge was duplicitous because it could have referred to any one of a number of criminal acts that the defendant may have committed.

Here, on the other hand, Bates has been charged with a distinct, identifiable offense: he willfully misapplied specified amounts of federally guaranteed Title IV funds on twelve specified occasions. Although admittedly bareboned, the indictment in this case included all of the requisite elements of willful misapplication under § 1097(a), and it certainly alleged sufficient facts to apprise Bates of the charges against him.

The judgment of the district court dismissing the indictment is VACATED, and the cause is REMANDED to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Date: September 20, 1996

(Caption Omitted)

The judgment of the District Court is VACATED, and this cause is REMANDED, in accordance with the decision of this court entered on this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

October 23, 1996

(Caption Omitted)

The following are before the court:

1. MOTION FOR STAY OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT, filed on October 9, 1996, by counsel for the appellee.

2. GOVERNMENT'S RESPONSE TO APPELLEE'S MOTION FOR STAY OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT, filed on October 21, 1996.

IT IS ORDERED that #1 is GRANTED and the mandate is STAYED until December 19, 1996. If the appellant has filed a petition for a Writ of Certiorari by that date, the mandate shall remain stayed pending resolution of the proceedings before the Supreme Court. If he has failed to do so, the mandate shall issue forthwith. Counsel is reminded of his obligation to comply with Circuit Rule 41(e).

UNITED STATES SENATE

COMMITTEE ON LABOR AND HUMAN RESOURCES

Washington, DC 20510-6300

February 28, 1992

Mr. James B. Thomas, Jr.
Inspector General
United States Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Dear Mr. Thomas:

I am writing to make clear my intention in proposing a modification in the language of Section 490 of Title IV of the Higher Education Act. This modification is found in section 479 of S. 1150, the Senate version of legislation reauthorizing the Higher Education Act.

My proposal, which was adopted by the Committee on Labor and Human Resources and included in S. 1150 as approved by the full Senate, adds to Section 490 a specific reference to the failure to make refunds of federal loan and grant funds provided or insured under Title IV. My purpose in proposing this language was to clarify what is already intended by this section and to foreclose any argument that the section does not reach the failure to make refunds.

Section 490 of the Higher Education Act as currently written is extremely broad and reaches a variety of improper conduct involving Title IV funds. The knowing and willful failure to make refunds has properly been prosecuted as a misapplication of Title IV funds under this section. The language I proposed for inclusion in S. 1150 was never intended to imply in any manner that the current law did not reach such conduct. On the contrary, my intention was to facilitate prosecution of such

conduct by specifically referencing it. I made this proposal because it came to my attention during the reauthorization process that the failure of some school owners to make refunds or make timely refunds is, unfortunately, a widespread abuse that causes serious harm to the integrity of the federal student financial assistance programs and harm to the students the programs are meant to benefit.

It would be an unfortunate perversion of my intention if this clarifying language in S. 1150 concerning refunds were to be read as an indication that it is not a misapplication within the meaning of the current section 490 for a school owner knowingly and willfully to fail to make required refunds in connection with federally insured student loans and federal student grants.

Warmest regards,

/s/ Nancy
NANCY LANDON KASSEBAUM
United States Senator

SUPREME COURT OF THE UNITED STATES

No. 96-7185

GARRIT BATES,

Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 18, 1997